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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 461

RUTH PAGE FISHER and THOMAS HART FISHER,
Petitioners,

vs.

PRINTING DEVELOPMENTS, INC., a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND THE MUNICIPAL COURT OF CHICAGO.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND THE MUNICIPAL COURT OF CHICAGO.

Petitioner, Ruth Page Fisher, respectfully prays this Court's writ of certiorari to review and reverse the decisions of the Illinois Supreme Court, the Appellate Court of Illinois, First District, and the Municipal Court of Chicago in this case. Petitioner, Thomas Hart Fisher, her co-party defendant in the trial court, and co-party appellant in the Appellate and Supreme Courts, joins in the petition.

CITATIONS TO OPINIONS BELOW.

There has been no opinion in the Illinois Supreme Court. The final judgment of the Illinois Supreme Court is reprinted in full as Appendix I to this petition.

The abstract of the opinion of the Appellate Court of Illinois, First District, is officially reported in 17 Ill. App. (2d) 553. This abstract, followed by the opinion in full, is reprinted as Appendix II to this petition.

The opinion of the Municipal Court of Chicago is not officially reported. It is reprinted in full as Appendix III to this petition. The final judgment of the Municipal Court of Chicago is reprinted in full as Appendix IV to this petition.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Illinois Appellate Court, First District, was filed and its judgment was rendered on May 28, 1958. Petitioners' timely Petition for Rehearing was denied on June 20, 1958. The judgment of the Supreme Court of Illinois denying Petitioners' timely Petition for Leave to Appeal was denied on September 16, 1958.

This Court's jurisdiction is invoked under Section 1257(3) of the United States Judicial Code (U.S.C.A., Title 28, Sec. 1257(3)) which confers upon this Court jurisdiction to review by certiorari decisions of the State Courts of last resort "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

THE QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

(1) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the entry of the void judgment of the Municipal Court of Chicago in a forcible detainer action for possession of real estate, such judgment being that Respondent here (plaintiff below) "have and recover" from her "possession of the premises" and that a writ of restitution issue against her therefor (Abst. 7), which judgment for possession was void because the Court never had jurisdiction over her since she was never served with process in the action, was never summoned in accordance with the Illinois Statute for substituted service, never filed any answer or made any appearance in the trial court, was never defaulted, and never took any part in the proceedings until after the void judgment had been entered, when she filed a Notice of Appeal from the void judgment to the Illinois Appellate Court, First District?

(2) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the entry of the void money judgment of the Municipal Court of Chicago against her for costs in favor of Respondent (as plaintiff below) in said forcible detainer action, such money judgment being void for the reasons stated in question (1) above?

(3) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the judgment of the Illinois Appellate Court, First District, which affirmed the void judgment of the Municipal Court of Chicago against her for possession of the premises sued for in the forcible entry action and granted a writ of restitution therefor, and for a money judgment for costs against her in such action?

(4) Was Petitioner, Ruth Page Fisher, deprived of due process of law under the 14th Amendment to the Federal Constitution by the judgment of the Supreme Court of Illinois denying her Petition for Leave to Appeal from the judgment of the Appellate Court of Illinois, First District, which affirmed the void judgment of the trial court?

As shown in the Argument below, this is a case in which a void judgment in a state trial court has been affirmed on appeal to the state court of last resort, upon the ground that the defendant against whom the void judgment ran had validated the void judgment, *after it was rendered*, merely by filing a notice of appeal to the upper appeal court. The basic question is, therefore, whether the defendant (Petitioner here) has been thereby deprived of due process of law under the 14th Amendment to the Federal Constitution, in the sense that she has been subjected to a void judgment to which she has never assented, unless her taking an appeal from the void judgment be deemed such an assent.

THE STATE STATUTE INVOLVED.

The State Statute involved is Paragraph 403 of the Municipal Court of Chicago Act (Illinois Revised Statutes, State Bar Association Edition, 1957, Chapter 37, Section 403), which provides in relevant part as follows:

> "(b) If the plaintiff, his agent or attorney, shall file in any . . . forcible detainer suit an affidavit stating that the defendant . . . on due inquiry cannot be found, . . . and also stating the place of residence of the defendant, if known, . . . if the case be a forcible detainer case and no claim for rent is joined with the complaint for possession, *the defendant may be notified by posting and mailing of notices as hereinafter provided in this section;* . . .

(c) . . . Whenever notice by posting is required or proper to be given to any defendant, said notice shall be in the name of the clerk of the court, be directed to the defendant, shall state the nature of the process against the defendant and at whose instance issued, . . . the time and place for trial, and shall also state that unless said defendant shall appear at the time and place fixed for trial, judgment will be entered by default, and shall also state the character of the judgment that will be rendered in said cause and of the execution that will be issued thereon, three copies of which notice the bailiff shall post in three public places in the neighborhood of the court where said cause is to be tried, at least ten days prior to the date set for the trial, *and if the place of residence of the defendant is stated in any affidavit on file, the bailiff shall at the same time mail one copy of the notice addressed to such defendant at such place of residence* and on or before the day set for trial said bailiff shall file said notice with an endorsement thereon stating the time when and places where he posted and to whom and at what address he mailed copies as herein required. *For want of sufficient notice any cause may be continued from time to time until the court has jurisdiction of any defendant.*" (Italics added.)

The official citation of the foregoing statutory provision is "An Act in relation to a Municipal Court in the City of Chicago. [Approved May 18, 1905. L. 1905, p. 157. Adopted at the election held November 7, 1905.]"

Petitioner also directs the Court's attention to Section 18 of the Illinois Forcible Entry and Detainer Act (Illinois Revised Statutes, State Bar Association Edition, 1957, Chapter 57, Section 19), which provides in relevant part as follows:

"If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this Act, such party may have an appeal,

to be taken to the same courts, in the same manner, and tried in the same way as appeals are taken and tried in other cases. *Provided such party files notice of appeal and bond within five (5) days from the rendition of the judgment, and no writ of restitution shall be issued in any cases until the expiration of said five (5) days. . .*" (Italics added.)

Petitioner further directs the Court's attention to Section 68.3 of the Illinois Civil Practice Act (Illinois Revised Statutes, State Bar Association Edition, Chapter 110, Section 68.3) which provides:

"(1) In chancery cases and in cases at law tried without a jury, any party may, within thirty days after the entry of the decree or judgment, file a motion for a rehearing, or a retrial, or modification of the decree or judgment or to vacate the decree or judgment or for other relief. *Neither the filing of nor the failure to file a motion under this section limits the scope of review.*" (Italics added.)

The parallel Section 68.3 of Rule 1 of the Municipal Court of Chicago is substantially identical to the foregoing Section 68.3 of the Illinois Civil Practice Act, and is identical insofar as the last sentence is concerned.

STATEMENT OF THE CASE.

Respondent (as plaintiff) sued Petitioner, Ruth Page Fisher (as a defendant), in a forcible detainer action for possession of real estate located in the City of Chicago, such action being filed in the Municipal Court of Chicago (Abst. 1-3). Petitioner, Thomas Hart Fisher, was also made a co-defendant in said action. He appeared at the trial before the court without a jury and participated therein.

As the Illinois Appellate Court's opinion correctly states, Petitioner, Ruth Page Fisher, "was never served with summons, entered no appearance, and filed no answer" in the Municipal Court of Chicago. She was never brought into the case by substituted service in accordance with the Illinois statute, was never defaulted, never appeared at the trial, and never took any part in the proceedings in the Municipal Court prior to the final judgment against her. The Municipal Court obtained no jurisdiction over her to enter any judgment against her.

The record in this case conclusively shows on its face as to substituted service by mailing that Petitioner, Ruth Page Fisher, was never brought into the Municipal Court because the bailiff did not serve her with process and did not properly mail to her the notice required for substituted service under Section [illegible] of the Municipal Court Act above cited. This is established by the following facts:

The action was originally filed on June 27, 1956 in the Municipal Court (Abst. 1). The original summons issued on that date, together with the return thereon by the bailiff dated July 2, 1956, shows that Petitioners were "not found" in the City of Chicago, Illinois (Abst. 2). An alias summons issued on August 23, 1956 likewise shows by the bailiff's return thereon dated August 28, 1956

that Petitioners were "not found" in the City of Chicago, Illinois (Abst. 2). A second alias summons issued on September 13, 1956, together with the bailiff's return dated September 18, 1956, again shows that Petitioners were "not found" in the City of Chicago, Illinois (Abst. 2-3). There was, therefore, no personal service of process upon her.

Thereafter on October 9, 1956, Respondent's attorney filed an "Affidavit of Non-Residence", stating that Petitioners on due inquiry could not be found and that:

> "The place of residence of such defendants [Petitioners here] is *1235 North Astor Street,* Chicago, Illinois" (Abst. 3). (Italics added.)

The record further shows that although proper notices were posted in accordance with the Municipal Court Act, nevertheless the bailiff of the Municipal Court failed to comply with *the mailing provisions* of Section 403 of the Municipal Court Act requiring mailing of notice of the suit to defendants (Petitioners). The bailiff's affidavit stated as to mailing that:

> "I also on the same day [October 9, 1956] mailed postage prepaid at Chicago, Illinois, 1 copy of said Notice, addressed to said Defendants, Thomas H. Fisher and Ruth Page Fisher, *540 N. Michigan Ave.,* Chicago, Illinois." (Abst. 4.) (Italics added.)

This affidavit of mailing of notice to Petitioner, Ruth P. Fisher, was insufficient, under Section 403 of the Municipal Court of Chicago Act above quoted, *first,* because there was then on file an Affidavit of Non-Residence prepared and filed by Respondent (as plaintiff) stating that the place of residence of both Petitioners (as defendants) was *1235 North Astor Street,* Chicago, Illinois (Abst. 3), whereas the bailiff's affidavit showed that he had not mailed the notice to said residence address, but

had mailed the same to both Petitioners at *540 North Michigan Avenue,* Chicago, Illinois; and *second*, because there was no showing whatever that any notice mailed to both petitioners at 540 North Michigan Avenue, Chicago, Illinois would or could conceivably reach Petitioners, Ruth Page Fisher, nor is there any showing that she received any such notice. In fact, the record shows that the real estate premises in question were located at 540 North Michigan Avenue, Chicago (Abst. 5), but that neither of the Petitioners had resided at 540 North Michigan Avenue since November, 1953. The basement premises involved in this action for possession were used solely for storage purposes (Abst. 33).

There was, therefore, no proper substituted service upon her.

After a trial in the Municipal Court of Chicago, at which only Petitioner, Thomas Hart Fisher, appeared and participated, the Municipal Court rendered a judgment for possession of the premises against *both* Petitioners, together with a money judgment for costs against *both* Petitioners (Abst. 7). (Appendix IV, p. 11).

The judgment of the Municipal Court of Chicago was obviously void as to Petitioner, Ruth Page Fisher, for the reason that the Municipal Court of Chicago never obtained any jurisdiction over her, either in the manner provided by the statute for substituted service by mailing to her, or by personal service of summons upon her. Such void judgment thereby deprived her of due process of law and the equal protection of the laws under the 14th Amendment to the Federal Constitution, unless her subsequent appeal therefrom constituted a consent to be bound by such void judgment, as the Illinois Appellate Court held in its opinion.

Four days after the void judgment was rendered against her, Petitioner, Ruth Page Fisher, joined in a Notice of Appeal therefrom to the Illinois Appellate Court, First District (Abst. 8). The Appellate Court affirmed the void judgment of the Municipal Court, upon the ground that "By joining in the appeal in this [Illinois Appellate court she [Petitioner Ruth Page Fisher] submitted to the jurisdiction of the [trial] court", adding "and the attempt to raise the question of service of process comes too late" (Appendix II, p. 4). It was this affirmance in the Illinois Appellate Court which first raised the issue of due process under the 14th Amendment to the Federal Constitution (and under the Illinois Constitution). Petitioners promptly raised the constitutional issue in their application for leave to appeal to the Illinois Supreme Court, as we show below.

The Illinois Appellate Court's reasoning was that Petitioner, Ruth Page Fisher, "could have moved the [trial] court to vacate the judgment entered against her in the trial court during the thirty-day term" allowed by Illinois law under Section 68.3 of the Illinois Civil Practice Act, despite the fact that Section 18 of the Illinois Forcible Entry and Detainer Act required that all appeals in forcible detainer actions be taken within five days from the entry of a final judgment for possession of real estate, and despite the further fact that Section 68.3 of the Illinois Civil Practice Act *expressly provided* that failure to file a motion to vacate the judgment within 30 days would *not* limit the scope of review by appeal.

The judgment of the Illinois Appellate Court became final on June 20, 1958, whereupon Petitioners timely filed their Petition for Leave to Appeal to the Supreme Court of Illinois from the judgment of the Illinois Appellate Court which had affirmed the void judgment of the Muni-

cipal Court of Chicago. In the Petition for Leave to Appeal to the Illinois Supreme Court, Petitioner, Ruth Page Fisher, expressly raised and relied upon her constitutional rights under the due process clause of the 14th Amendment to the Federal Constitution, stating (p. 8):

> "The decision of the Appellate Court has deprived the Petitioner, Ruth Page Fisher, of her constitutional rights under both the due process clause of the 14th Amendment to the Constitution of the United States and under the Constitution of Illinois, Article II, Sections 2 and 5. No constitutional principle is more fundamental than the right of a person to receive due notice, by service of summons or the equivalent, and to be thereby given an opportunity to defend before a judgment goes against him. By affirming a void judgment for both possession and costs against a person who was never brought into the court below, the Appellate Court has violated the constitutional rights of that person."

The denial of the Petitioners' Petition for Leave to Appeal to the Illinois Supreme Court on September 16, 1958 confirmed the deprivation by the Appellate and Municipal Courts of the right of Petitioner, Ruth Page Fisher, to due process of law under the 14th Amendment to the Federal Constitution.

Petitioner, Thomas Hart Fisher, joins in this appeal for the reason that under Illinois law a judgment which is void as to an indispensable party defendant is also void as to other defendants. The complaint in the Municipal Court of Chicago shows that the Petitioner, Ruth Page Fisher, was an indispensable party in that it alleged that "defendants, or one of them, have unlawfully withheld and do now continue to withhold possession from plaintiff. . . ." (Abst. 2.), and the void judgment for possession and costs was a joint judgment against *both* defendants. Therefore, if the void judgment of the Municipal Court in this

case is reversed by this Court as to Petitioner, Ruth Page Fisher, the same joint judgment against Petitioner, Thomas Hart Fisher, must also be reversed for, under Illinois law, it must stand or fall as to both Petitioners. The fact that Petitioner, Ruth Page Fisher, was the wife of Petitioner, Thomas Hart Fisher, in nowise deprived her of the right to attack the void judgment against her for want of service of process, actual or constructive, upon her, under Illinois law.*

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* See **Robinson v. Robinson**, 329 Ill. App. 515.

ARGUMENT.

I.

NO JUDGMENT OF A COURT IS DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT IF RENDERED WITHOUT NOTICE TO THE PARTY AGAINST WHOM THE JUDGMENT RUNS.

The judgment of the Municipal Court of Chicago involved in this case has two parts: *first,* a judgment for possession of real estate situated in the territorial jurisdiction of the court rendering the judgment and, *second,* a money judgment for costs. Both of these judgments ran against Petitioner, Ruth Page Fisher, as well as against Petitioner, Thomas Hart Fisher, as joint defendants in a forcible detainer action instituted against them by Respondent, Printing Developments, Inc., a corporation, as plaintiff, in the Municipal Court of Chicago.

The first constitutional question raised by this petition is whether Petitioner, Ruth Page Fisher, was deprived of due process of law under the 14th Amendment to the Federal Constitution by the failure of the Municipal Court of Chicago to obtain jurisdiction over her for the rendition of the foregoing judgment against her, and by the subsequent affirmance of such void judgment by the Illinois Appellate Court, and the failure of the Illinois Supreme Court to grant leave to appeal from and to reverse the lower courts.

The second constitutional question is whether the Illinois courts in this case have denied her due process of law, by entering, affirming and refusing to vacate a void judgment against her upon the ground that her appeal therefrom, after it was rendered, somehow validated the void judgment.

The Judgment for the Possession of Real Estate was Void as In Contravention of Federal Law.

Insofar as the judgment was a judgment for possession of real estate, Petitioner, Ruth Page Fisher, would obviously not have been deprived of due process of law if she had either been properly brought into the action by service of summons, or properly notified thereof under Section 403 of the Municipal Court of Chicago Act governing substituted service of process in forcible detainer actions in that Court (Ill. Rev. Stat., 1957, Chap. 37, Sec. 403). In other words, actual personal service of summons upon her would not be an essential element of due process of law, *provided* that she were properly notified of the pendency of the forcible detainer action in accordance with Section 403 of the Municipal Court of Chicago Act.

The record conclusively shows, as indicated in the Statement of the Case above, that there was no personal service of summons upon her (Abst. 2-3). The Illinois Appellate Court's opinion correctly found that Petitioner, Ruth Page Fisher, "was never served with summons, entered no appearance and filed no answer in the Municipal Court." In addition, it should also have found that she was never brought into the case by substituted service in accordance with the Illinois statute, and that she was never defaulted, never appeared at the trial and never took part in the proceedings prior to final judgment.

In order to obtain substituted service upon her, the bailiff was required to mail "one copy of the notice addressed to such defendant" at "*the place of residence of the defendant*" as "stated in any affidavit on file", all as provided in Section 403 of the Municipal Court of Chicago Act relating to notice by mailing to defendants in forcible detainer suits.

The record shows (Abst. 3) that on October 9, 1956, Respondent's own attorney filed an "Affidavit of Non-Residence", stating that Petitioner, Ruth Page Fisher's, place of residence was at 1235 North Astor Street, Chicago, Illinois.

The record further shows that the bailiff, instead of complying with Section 403 by mailing a copy of the notice to her at her "place of residence", to-wit, 1235 North Astor Street, Chicago, mailed no copy of the notice there, but actually mailed the copy of such notice to her at 540 North Michigan Avenue, Chicago (Abst. 4). This was the address of the premises involved in the action, which were used exclusively for storage purposes, and where it was plain that she would never receive the notice (and in fact she never did), since it was *not* her "place of residence." *There can be no question, therefore, that the Municipal Court never obtained any jurisdiction over Petitioner, Ruth Page Fisher, as defendant in the forcible detainer case for the purpose of rendering any judgment against her.*

The question whether a judgment of a court is due process of law, if rendered without notice to a party subjected to the judgment, was considered by this Court in the case of *Scott* v. *McNeal*, 154 U.S. 34. In that case the plaintiff owned certain lands of which he was deprived by a judgment of the Probate Court in the State of Washington in a proceeding purportedly administering the plaintiff's property as though the plaintiff were deceased, when in fact he was alive. This Court reversed the judgment of the Supreme Court of Washington in favor of the defendants in a subsequent action of ejectment brought by the plaintiff to recover possession of his property, upon the ground that the 14th Amendment to the Federal Con-

stitution extends 'to all acts of the State, whether through its legislative, its executive or its judicial authorities". The Court continued (p. 46):

> "No judgment of a court in due process of law, if rendered without jurisdiction in the court, or without notice to the party.
>
> The words 'due process of law', when applied to judicial proceedings, as was said by *Mr. Justice* Field speaking for this Court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' *Pennoyer* v. *Neff*, 95 U.S. 714, 733.
>
> Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court [cases cited]. And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist."

The same principle that notice must be given in some proper form to a defendant before a valid judgment can be given against him in any case was recognized in this Court in the case of *Twining* v. *New Jersey*, 211 U.S. 78. Though the issues and facts in the *Twining* case bear no resemblance to those here, this Court enunciated the following principle of constitutional law (p. 110):

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction . (*Pennoyer* v. *Neff*, 95 U.S. 714, 733; *Scott* v.

McNeal, 154 U.S. 34; *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U.S. 8), and that there shall be notice and opportunity for hearing given the parties. (*Hovey* v. *Elliott*, 167 U.S. 409; *Roller* v. *Holly*, 176 U.S. 398; and see *Londoner* v. *Denver*, 210 U.S. 373)."

The same principle was again enunciated by this Court in the case of *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673. Again the facts bear no resemblance to the case at bar, but this Court said (p. 681):

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. . . . Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Teleg. & Cable Co.* v. *Newport*, 247 U.S. 464, 475, 476."

The case of *Shelley* v. *Kraemer*, 334 U.S. 1, another case bearing no resemblance to this case upon the facts, nevertheless afforded this Court an opportunity to make the following observation (p. 16):

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673. Cf. *Pennoyer* v. *Neff*, 95 U.S. 714."

Again, in *Standard Oil Co.* v. *Missouri ex rel. Hadley*, 224 U.S. 280, this Court said on this subject (p. 281):

> The Federal question is whether, in that court [the Supreme Court of Missouri], with such jurisdiction

[original quo warranto proceedings], the defendants were denied due process of law. Under the 14th Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice."

The void judgment for possession was, therefore, not due process of law under the 14th Amendment.

The Money Judgment for Costs was Void as In Contravention of Federal Law.

Turning to the money judgment for costs rendered by the Municipal Court of Chicago against the Petitioner, Ruth Page Fisher, since no process was personally served upon her in the State of Illinois or elsewhere, since no substituted service was ever had upon her, and since she never appeared in the proceedings, it is plain that the money judgment against her was not merely voidable, but was absolutely void for want of jurisdiction over her.

It is quite unthinkable that a money judgment for costs can constitutionally be entered in any case against any defendant who, not having been properly served or notified of the proceeding, refuses to enter any appearance, refuses to file an answer and refuses to participate in the proceedings. Costs can only be constitutionally awarded against parties who are properly served or notified, or who voluntarily participate in the litigation. To enter a money judgment for costs against a defendant who, having never been served or notified, also refuses to enter the proceedings at all, is not due process of law under the 14th Amendment. A money judgment for costs against a defendant under these circumstances is held to be void under Illinois law. *Mead* v. *Mead*, 205 Ill. App. 327; *Bickerdike*

v. *Allen*, 157 Ill. 95, 102; *Griffin* v. *County of Cook*, 369 Ill. 380, 387-8. Conversely, a money judgment for costs cannot validly be rendered in Illinois in favor of a defendant who has entered no appearance in the case. *Harty* v. *Smith*, 74 Ill. App. 194; *G. A. Crancer Co.* v. *Williams*, 191 Ill. 451.

Such a money judgment for costs is not due process of law under the 14th Amendment.

II.

A VOID JUDGMENT CANNOT BE VALIDATED MERELY BY A SUBSEQUENT APPEAL THEREFROM; AND A PARTY AGAINST WHOM A VOID JUDGMENT HAS BEEN RENDERED IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION BY AN AFFIRMANCE OF A VOID JUDGMENT ON APPEAL.

So far as we are able to determine, this is a unique case in the history of modern American jufisprudence. A void judgment in a state trial court has been affirmed upon appeal to the State Court of last resort, upon the incredible ground that the defendant against whom the void judgment ran had validated the void judgment after it was rendered merely by filing a notice of appeal to the State Appeal Court.

In the case at bar, the State statute (Section 18 of the Illinois Forcible Entry and Detainer Act) (Ill. Rev. Stat., 1957, Chap. 57, Sec. 19) required in forcible detainer cases that any party against whom a judgment was rendered for possession who desired to take an appeal therefrom must file a notice of appeal and bond within five days from the rendition of the judgment. The same statute withheld the writ of restitution until the expiration of such five days.

On the fourth day after the judgment was rendered in this case in the Municipal Court of Chicago against the Petitioner, Ruth Page Fisher, she filed a notice of appeal to the Illinois Appellate Court (Abst. 8). Void judgments are fully appealable under Illinois law. See *People* v. *Evans*, 262 Ill. 235, and other Illinois cases cited below.

It was the position of the Appellate Court in affirming this judgment that Petitioner, Ruth Page Fisher, had validated the prior void judgment of the Municipal Court, merely by joining in the subsequent appeal to the Appellate Court. As the Appellate Court expressed it in its opinion:

> "By joining in the appeal in this [Illinois Appellate] court she [Petitioner, Ruth Page Fisher] submitted to the jurisdiction of the [trial] court, and the attempt to raise the question of service of process comes too late." (Appendix II, p. 4.)

Under the law of Illinois, it is undeniable that Petitioner, Ruth Page Fisher, had the right of election, *either* to move to vacate the void judgment within thirty days *or* to appeal to the Illinois Appellate Court for a reversal of the void judgment of the Municipal Court within the five-day period allowed by Section 18 of the Illinois Forcible Entry and Detainer Act, without making such a motion to vacate. It was this latter right of which Petitioner, Ruth Page Fisher, elected to avail herself in taking the appeal to reverse the void judgment, four days after the void judgment was rendered. To deprive her of the benefit of her right to appeal under Section 18 and thereby secure a reversal of the void judgment would deprive her of the equal protection of the laws guaranteed to her by the 14th Amendment. The entry of the void judgment in the Municipal Court and the affirmance of the void judgment by the Illinois Appellate Court deprived her of due process of law under the 14th Amendment.

That the right of Petitioner, Ruth Page Fisher, to refuse to file a motion to vacate the void judgment within thirty days, and instead to appeal within five days to the Illinois Appellate Court for a reversal did not affect her right of appeal is shown by Section 68.3 of the Illinois Civil Practice Act and the identical provision of Section 68.3 of the Rule of the Municipal Court of Chicago, both of which provide (in the final sentence):

> "Neither the filing of nor the failure to file a motion under this section [to vacate a prior judgment] limits the scope of review [on appeal]."

Thus the Illinois statute and rule cited above expressly provide that the failure of an appellant to avail himself of the right to attack a judgment against him by motion within thirty days in the trial court shall *not* affect or limit such party's right to appeal from the adverse judgment to the Illinois Appellate Court.

The Illinois cases are to the same effect. They hold that a party may appeal to the upper court without first moving to vacate the judgment in the trial court appealed from. See *Atlas Finishing Co.* v. *Anderson*, 336 Ill. App. 167, citing *Climax Tag Co.* v. *American Tag Co.*, 234 Ill. 179, in which *Atlas* case the Illinois Supreme Court was construing this same Section 68 of the Illinois Civil Practice Act. The Illinois Supreme Court quoted the following language from its own prior opinion in the *Climax* case:

> "A motion for a new trial in cases tried by a court without a jury is neither required nor authorized by law or rules of practice, and can serve no purpose whatever in preserving questions for review in this court."

See also *Keith* v. *Arnold & Co.*, 254 Ill. App. 115; *Transcontinental Ins. Co.* v. *Rosenbloom*, 274 Ill. App. 341; *Niagara Fire Ins. Co.* v. *Forehand*, 169 Ill. 626; *Trout* v. *Herrin*, 245 Ill. App. 346. All are to like effect.

That this right of election to appeal to reverse a void judgment is a substantial one is shown by the penalty imposed upon an Illinois defendant who elects to rely upon a motion to vacate a void judgment. Merely by making the motion to vacate, and having it granted, the defendant voluntarily submits himself to the future jurisdiction of the trial court. *Lord* v. *Hubert*, 12 Ill. (2d) 83, 87. And if the motion to vacate is denied, the defendant will have lost the right to appeal by expiration of the five-day period.

We do not, of course, contend that the right to appeal from a judgment in and of itself is essential to due process of law. It is not. Nor do we say that a right to appeal may not be properly qualified and yet constitute due process. It may. What we do say is that if an unqualified right of appeal from a judgment which is void, without first making a prior motion to vacate the void judgment, exists, as it clearly does under Illinois law as shown above, then it is unconstitutional to enter the void judgment in the first place, and to deprive a defendant of this right to vacate the void judgment by appeal in the second place, for such defendant is thereby denied due process of law and the equal protection of the laws guaranteed by the 14th Amendment.

It is a travesty on justice for a state to grant a right of appeal from a void judgment, as does Illinois (*People* v. *Evans*, 262 Ill. 235; *Moffat Coal Co.* v. *Industrial Commission*, 397 Ill. 196; *People* v. *Coal Belt Elec. Ry. Co.*, 311 Ill. 29; *Donnersberger* v. *People*, 293 Ill. 148), and then to hold on the appeal that the void judgment be affirmed because the mere filing of a notice of appeal to reverse the

void judgment validates the void judgment. Certainly this does not constitute due process of law and equal protection of the laws under the 14th Amendment.

What this really amounts to is entrapment by State judicial procedure. Defendant is first subjected to a void judgment in the State Court in defiance of the constitutional protection against such lack of due process, and then, when the Defendant resorts to the state-granted right of appeal to reverse the void judgment, the State judicially closes the trap by holding that the exercise of the right of appeal validates the void judgment. This amounts to the State, through its judicial process, flouting the right of due process of law and equal protection of the laws guaranteed to the States' citizens by the 14th Amendment to the Federal Constitution.

In this case Petitioner, Ruth Page Fisher, has thus had her property rights to possession of real estate taken from her in defiance of the Federal rights guaranteed to her under the 14th Amendment to the Federal Constitution.

Only by this Court's issuance of its writ of *certiorari* can this result be prevented.

CONCLUSION.

We recognize that the granting of a petition for *certiorari* is discretionary with the Court, and that such writ will not be granted merely because of error by the Illinois State Courts, unless such error contravenes fundamental Federal law.

But the importance of this case lies in the fact that the Illinois Courts have announced a rule which would wholly subvert due process of law and the equal protection of the laws, guaranteed by the 14th Amendment, in State Courts.

To grant, as the Illinois statutes and law do, the unqualified right to appeal from a void judgment, and then to hold that the exercise of such right of appeal validates the void judgment and justifies its affirmance on the appeal, introduces into State Court procedure a conception of far reaching evil consequences wholly subversive of Federal law.

We regard the decision of the Illinois Supreme Court in rejecting the appeal from the Illinois Appellate Court, the action of affirmance in the Illinois Appellate Court of the void judgment in the trial court, and the entry of the void judgment in the Municipal Court of Chicago as depriving Petitioner, Ruth Page Fisher, of her substantial Federal rights.

PRAYER FOR THIS COURT'S WRIT OF CERTIORARI

For reasons apparent from the record and stated in this Petition for Certiorari, Petitioners respectfully pray that this Court issue its writ of *certiorari* to review and reverse the judgments of the Illinois Supreme Court, the Illinois Appellate Court, First District, and the Municipal Court of Chicago in this case, to the end that Petitioners' Federal rights herein claimed may be effectuated.

Respectfully submitted,

HORACE A. YOUNG,
NORMAN CRAWFORD,
135 South La Salle Street,
Chicago 3, Illinois,
Randolph 6-7871,
Attorneys for Petitioners.

CERTIFICATE AND PROOF OF SERVICE.

Horace A. Young hereby certifies that he has caused service of this Petition to be made upon opposing counsel by the sending of three printed copies of the Petition for Certiorari to counsel of record for Respondent at their address as shown of record in the courts below.

HORACE A. YOUNG,
a member of the Bar of this Court.

APPENDIX I.

State of Illinois,
Supreme Court—ss.

Be It Remembered, that, to-wit: on the 16th day of September, 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Thomas Hart Fisher and Ruth Page Fisher, his wife, *Petitioners* vs. Printing Developments, Inc., a corporation, *Respondent*	Petition for Leave to Appeal from Appellate Court First District 56 M 57357 47146

No. 34982

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioners costs by it in this behalf expended, to be taxed, and that it have execution therefor.

APPENDIX II.

Printing Developments, Inc., Plaintiff-Appellee, v. Thomas Hart Fisher and Ruth Page Fisher, His Wife, Defendants-Appellants.

Gen. No. 47,146 (Abstract of Decision.)

First District, Second Division.

May 28, 1958.

Rehearing denied June 20, 1958.

Released for publication July 1, 1958.

Appearances, § 12—joinder in appeal of a codefendant as constituting submission to jurisdiction of court.

Where wife, who was codefendant with her husband in a forcible detainer suit in which judgment for possession was entered in favor of plaintiff, was never served with summons, entered no appearance, and filed no answer, but she joined in appeal of her husband from such judgment, she thereby submitted to jurisdiction of court, and her attempt on appeal to raise question of service of process came too late.

Appeal from Municipal Court of Chicago; the Hon. Joseph J. Butler, Judge, presiding. Affirmed. Norman Crawford, for appellants; MacLeish, Spray, Price & Underwood (Cranston Spray, and Wendell J. Brown, of counsel) for plaintiff-appellee. Opinion by Justice Lewe. *Not to be published in full.*

OPINION OF THE APPELLATE COURT.

Mr. Justice Lewe Delivered The Opinion Of The Court.

Defendants appeal from a judgment entered in a Forcible Detainer Suit. The premises in controversy consist of approximately 350 square feet enclosed as a storeroom in the basement storage in the Michigan Square Building, known as "B-3", and located at 540 North Michigan Avenue in the City of Chicago, Illinois.

Defendants occupied certain space on the tenth floor in the Michigan Square Building under written leases from 1930 until 1945. Thomas H. Fisher executed a written lease for the tenth floor for the month of November, 1953. Upon the termination of this lease, defendants vacated the premises on the tenth floor. Defendants also used the storeroom space known as "B-3" in the basement. In October, 1953, when Thomas H. Fisher executed the lease for one month for the tenth floor, he asked plaintiff for a little more time to remove property of defendants in the storeroom. This storeroom at all times was fully enclosed and kept under lock and key. Defendants had a key to B-3, and it was accessible to them at all times.

Commencing in February, 1954, and in 1955, until March 20, 1956, oral requests were repeatedly made by plaintiff to defendants to remove property from B-3. March 20, 1956, plaintiff served written notice on defendant, Thomas H. Fisher, which read as follows:

"Dear Sir:

"It has been considerably more than a year since I called you with respect to certain valuable basement space in the above building, which is being used for storage of some personal property belonging to you. At that time you told me that you were making arrangements which would be completed in a few months to remove your said property. Since that time I have made a number of telephone calls to your office but received no response to my messages.

Since this basement space is needed for building purposes, we cannot permit this situation to continue. We must, therefore, ask that you make immediate arrangements to remove your property without delay. If there is any reason why this is not possible, please so advise us and we may be able to be of some assistance.

Very truly yours,
Arthur Rubloff & Co.
S. L. Edelstein"

Fisher failed to remove the property, and on June 27, 1956, Forcible Detainer proceedings were instituted for possession of the premises B-3.

The record shows that Ruth P. Fisher, wife of Thomas H. Fisher, was never served with summons, entered no appearance, and filed no answer. But, four days after the judgment was entered, she joined in the appeal of Thomas H. Fisher.

The question presented is whether the judgment for possession in the Forcible Detainer Suit is void as against defendant, Ruth Page Fisher, for lack of service of process.

This question can be raised only by filing a special appearance in the trial court. Being a dilatory motion, it does not reach the merits of the case, and failure to confine an appearance to a denial of jurisdiction, will change the appearance to a general one. *Kelly* v. *Brown*, 310 Ill. 319. To avail herself of the right to question the jurisdiction of the court, defendant, Ruth Page Fisher, should either have not appeared at all or limited her appearance to an objection against the jurisdiction of the court. *Craven* v. *Craven*, 407 Ill. 252. Moreover, Ruth P. Fisher could have moved the court to vacate the judgment entered against her in the trial court during the thirty day term in accordance with Illinois Revised Statutes, Chapter 110, par. 50(6) and Municipal Court Rule 1, Section 50(6). By joining in the appeal in this Court, she submitted to the jurisdiction of the court, and the attempt to raise the question of service of process comes too late.

Defendants further contend that plaintiff's suit for possession of the space known as "B-3" should fail because plaintiff had leased these premises to Time, Incorporated.

The only evidence in the record bearing on this point is where Thomas H. Fisher cross-examined plaintiff's witness, Walter C. Finn, who managed the building for Arthur Rubloff & Co. The questions propounded by Thomas H. Fisher and the answers given by Mr. Finn read:

"Q. Now, you used the word, 'Time, T-i-m-e, in one of your answer. You meant Time, Incorporated, the publisher of Time magazine, Fortune magazine and Life magazine, did you?

"A. I meant Time, Incorporated, that is correct, as embodies the tenants of the Michigan Square Building. They have a tenancy at the Michigan Square Building.

"Q. Now I am lost. What tenancy have they got there?

"A. They rent from Printing Developments, Inc., Mr. Fisher.

"Q. What space do they lease in the building?

"A. Well, they go from partial occupancy on the second floor completely through the building to and including the basement that we are speaking of now.

"Q. The B-23, B-3 areas?

"A. In that general area, yes, Mr. Fisher.

"Mr. Brown: Not B-3.

"The Witness: I said in that general area."

The record further shows that partitions were removed from B-23, as well as other storage spaces B-25, B-26 and B-27. This space, which was formerly enclosed, is now all open. None of this area includes the space known as "B-3". Nor does it appear that the space known as "B-3" was leased to Time, Inc. Moreover, the defense that there was outstanding a lease of the same premises to Time, Inc., was not raised in the trial court. In our view, the contention is without merit. This is a suit for wrongful detention and title cannot be inquired into. The

right to immediate possession is all that is involved or can be determined. It appears to us that defendants argue that plaintiff is obligated to trace its title from the original patent deed. This is not necessary in a possessory action.

The undisputed evidence shows that the title to the building at 540 N. Michigan Avenue was conveyed February 28, 1945 by special warranty deed issued by the Northwestern Mutual Life Insurance Company to the Michigan Square Building Corporation; that the Michigan Square Building Corporation merged with the plaintiff; and that under the articles of merger, all title to the real estate in question became the property of plaintiff. Seymour Edelstein, Secretary and Treasurer of Arthur Rubloff & Company, agents, testified that at the time plaintiff became owner of the premises by virtue of the merger, that same company continued as manager of the premises, and that on December 31, 1952, the Michigan Square Building Corporation assigned the management contract dated May 22, 1951 to plaintiff. Walter C. Finn, manager of the building at 540 N. Michigan Avenue, testified that all "leases went across his desk" during the six years of his administration; that no lease was made for storage in B-3 with either defendant in this period; and that neither of them has produced receipts to show that any rent was paid after October 14, 1953.

Defendants insist that where a holdover tenant occupies the premises involved and pays rent for a period of seven or eight years, plaintiff is required to give proper notice to the tenant.

The lease for the tenth floor space made no mention of the B-3 area. Proof is lacking that any rent was paid for the basement storage space during the 7 or 8 years immediately prior to 1953, or that defendants were holdover

tenants. In any event, these questions of fact were determined adversely to defendants by the trial court. We perceive nothing indicating the relationship of landlord and tenant. The court could find that defendants were mere licensees, and plaintiff had only to give notice that the license was revoked. (*Dunstedter* v. *Dunstedter*, 77 Ill. 580 and *B. J. Bielzloff Products Company* v. *James B. Beam Distilling Company*, 3 Ill. App. 2d 530.)

Finally defendants contend that the premises in question are not sufficiently described in the pleadings. It is our view that the premises referred to by all parties as, the basement storage space, B-3, at 540 N. Michigan Ave. in Chicago, Illinois, are sufficiently described. (*Chicago Ry. Equipment Co.* v. *Wilson*, 250 Ill. App. 231 and *Mills* v. *Reiger*, 328 Ill. App. 230.) There is no evidence in the record that there was any doubt or confusion regarding the exact space plaintiff sought to recover. On the contrary, it is uncontroverted that the premises involved were enclosed; that they contained a door with a cabinet lock; that defendants held a key; and that defendants admit in their answer that they hold possession of the premises in controversy.

We have considered the other points argued and the authorities cited in support thereof, but in the view we take of this case, it is unnecessary to discuss them. Therefore, for these reasons, the judgment below is affirmed.

AFFIRMED.

KILEY, P.J. and MURPHY, J. CONCUR.

Abstract Only.

APPENDIX III.

IN THE MUNICIPAL COURT OF CHICAGO,
FIRST DISTRICT.
No. 56 M 57357.

The Court: There is no doubt in my mind but that the Plaintiff has a perfect right to bring this suit.

The Court has in front of it the deed, recorded in the Office of the Recorder of Deeds of Cook County, Illinois, Special Warranty Deed from the Northwestern to the Michigan Square Building Corporation.

And also recorded with the Secretary of State and with the Recorder of Deeds of Cook County, Illinois, is a merger of Michigan Square Building Corporation with the Printing Developments, Inc., giving all assets of the Michigan Square Building Corporation to the Printing Developments, Inc.

That is a duly recognized corporation, recorded in the Office of the Secretary of State of this state.

As far as the demand is concerned, I am satisfied that the demand was made.

I have in front of me Exhibit No. 9, a copy of a letter to Mr. Thomas Fisher, addressed on March 20, 1956, stating: "We ask that you make immediate arrangement to remove your property without delay. If there is any reason why this is not possible, please advise us so we will be able to be of some assistance." Signed, Arthur Rubloff & Company, Managing Agent for Printing Developments, Inc.

I believe there was a demand, and I believe Printing Developments, Inc. has a right to bring the action.

Furthermore, the argument on service, whether it was right or wrong, as Mr. Fisher contends, being across from the Plaintiff, which is an unusual circumstance, I think we

agreed in the middle of this case that service is not part of this case.

First of all, the Defendant has put himself within the Court's jurisdiction by filing a full defense without a special appearance. So whatever rights he had have been waived by the defense and also by oral statements here in Court today.

Defendant has now no written lease. I don't mean by that he might not have had one a year or two ago and he can't find it and it might have been in a prior case; but as of right now there is no written lease in existence, there is no written lease in force.

Also, I wish to point out for the record that Mr. Fisher, the defendant, had a lease for one month with Printing Developments, Inc. I point out also that the deed to its predecessor prior to the merger includes a legal description, lots, blocks, sections, townships and range, which show the entire property. That means the tenth floor or the basement just as well as the tenth floor. And Mr. Fisher signed a lease for one month on the tenth floor, and the Plaintiff had just as much a right to the base ment under the terms of the prior deed and merger in the basement under those instruments as he did on the tenth floor. In other words, one building goes by lot, block, section, range, name of subdivision, transfer.

There is a deed in evidence here also, and a demand has been made.

There will be a finding for the plaintiff.

I will go one step further. I cannot understand, Mister Plaintiff, why you just didn't take the personal property out of there and put it away somewhere and forget it.

I think the Defendant, in my opinion—I know he is going to appeal this; good-luck to him—I don't think he has any right there whatsoever. I am amazed he stayed there so long.

Finding for the Plaintiff. Judgment for possession. Writ stayed five days. In case of appeal make a nominal bond. Approximately what would you suggest for appeal?

Mr. Fisher: $250.00.

The Court: $250 is enough for the bond.

APPENDIX IV.

IN THE MUNICIPAL COURT OF CHICAGO,
FIRST DISTRICT.
No. 56 M 57357.

Judgment entered November 1, 1956.

Now come the parties to this cause and thereupon this cause comes on in regular course for trial before the court without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises enters the following finding, to-wit:

> "The Court finds the Defendants, Thomas H. Fisher and Ruth Page Fisher, guilty of unlawfully withholding from the Plaintiff the possession of the premises described in Plaintiff's complaint herein and that the right to the possession of said premises is in the Plaintiff".

This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendants, Thomas H. Fisher and Ruth Page Fisher, possession of the premises described in the complaint herein, and that the writ of restitution issue therefor.

It is further considered by the Court that the plaintiff have and recover of and from the defendants, the costs by the plaintiff herein expended and that execution issue therefor.

It is further ordered by the Court that the Writ of Restitution herein be and the same is hereby stayed ten (10) days.

Appeal Bond set at $250.00.